

1999

Terry Dee Snarr v. Kenneth Guy Snarr : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TERRY DEE SNARR,

Petitioner/Appellant,

VS.

KENNETH GUY SNARR,

Respondent/Appellee.

Case No. 990285-CA

ORAL ARGUMENT REQUESTED
Priority 15

BRIEF OF RESPONDENT/APPELLEE

AN APPEAL FROM AN ORDER OF DISMISAL OF DIVORCE PETITION,
THIRD DISTRICT COURT FOR SALT LAKE COUNTY,
HONORABLE ANNE M. STIRBA, PRESIDING

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Utah Court of Appeals

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has appellate jurisdiction including jurisdiction of interlocutory appeals, to review all decisions of the district courts involving domestic relations cases including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity under Section 78-2a-3(h) U.C.A. (1953), as amended.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The District Court granted the Appellee's Motion To Dismiss/Motion For Summary Judgment. The issues to be decided on appeal are as follows:

1. Whether the District Court erred in dismissing the Petitioner's Complaint with prejudice. Because the District Court applied Utah's Common Law Marriage Statute, Section 30-1-4.5 U.C.A. (1953), as amended, in dismissing the Petitioner's Complaint, the review presents a question of law and one reviewed under a correctness standard. Harmon City, Inc. v. Nielsen, 907 P.2d 1162, 1167 (Utah 1995). Also, in reviewing a district court's dismissal of a complaint pursuant to summary judgment, the review is one of correctness. Taylor v. Ogden Sch. Dist., 927 P.2d 159, 162 (Utah 1996). When construing a statute, the reviewing authority must give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. Craftsman Builder's Supply v. Butler Mfg., 974 P.2d 1194 (Utah 1999).

2. Whether the District Court erred in holding that the Appellee had

not waived any defenses to the Appellant's action. A review of a district court's determination is a question of law reviewed for correctness. Plateau Min. v. Utah Div. Of State Lands, 802 P.2d 720 (Utah 1990).

3. Whether the District Court erred in finding Utah's Common Law Marriage Statute, Section 30-1-4.5 U.C.A. (1953), as amended, constitutional and rejecting arguments that the statute is one of limitations or repose. A review presents a question of law with no deference given to the trial court. Warren v. Melville, 937 P.2d 556 (Ut. App. 1997). However, a strong presumption exists that a statute is constitutional with doubts resolved in favor of its constitutionality. Id.

4. Whether the District Court erred in failing to award the Appellee attorneys fees and costs and whether he is entitled to them on appeal.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by the Appellant/Petitioner seeking to establish a common law marriage under Section 30-1-4.5 U.C.A. (1953), as amended, in order to obtain a division of properties owned by the Appellee/Respondent and an award of alimony in the form of a decree of divorce.

B. Course of Proceedings.

The Appellant and Appellee were married on February 25, 1969, and divorced in 1980 (R. 33). Shortly thereafter, they decided to reside together and did so until July 7, 1996, when they separated for the final time. (R. 33)

The Appellant filed an action in the Third Judicial District Court on October 7, 1996, seeking to establish a common law marriage (R 1) Her Complaint also sought, inter alia, a decree of divorce and an award of the Appellee's assets, an allocation of debts, and an award of alimony

The Appellee answered the Complaint on February 14, 1997 and set forth as an affirmative defense that the Appellant had failed to state a claim for which relief could be granted

Thereafter, the Appellant did nothing to move the case to trial or to establish the marriage relationship Indeed, the only requests for a trial date were filed by the Respondent.¹ It is undisputed that the Appellant failed to establish any common law marriage relationship between the parties either during their relationship or within one year following the termination of their relationship (R 209, R 223)

During the course of the proceedings, the parties engaged in discovery The Appellant also filed a Motion For Order To Show Cause seeking temporary spousal support on August 29, 1997 (R 21) The parties settled this Motion prior to hearing with the Appellee voluntarily agreeing to pay temporary alimony pending trial on the condition that such agreement could not be construed as an admission or precedent for an alimony award at trial (R 67)

¹ The Appellee's first request was filed on February 14, 1997 (R 9) The Appellee's second request was filed on September 29, 1997 (R 59)

Trial was scheduled for August 12, 1998. On August 10, 1998, the Appellee mailed and faxed to opposing counsel a Motion To Dismiss. (R. 124-125). The Motion to Dismiss was based on Rule 12(b)(1) of the Utah Rules of Civil Procedure because the Appellant had failed to establish a common law marriage relationship within one year following the termination of the parties' relationship. (R. 126-129). The Motion To Dismiss was filed with the Court on August 12, 1998, the day of trial.

On August 12, 1998, before trial, the parties' counsel discussed the Appellee's Motion To Dismiss in chambers with the trial court, the Honorable Anne M. Stirba, presiding. After having discussed the matter off record, the parties went on record and argued their respective cases concerning the Appellee's Motion to Dismiss. (Transcript of Proceedings, 8/12/99, p. 3). The Court then recessed and convened again in chambers. (Id., p. 18). At that time, the Appellant asked that the trial be continued and that the Appellant be given the opportunity to prepare and file a responsive brief to the Appellee's Motion To Dismiss. (Id.). The Court suggested that the matter be re-filed by the Appellee in the form of a Motion For Summary Judgment. (Id., p. 19). The Court stated that it may refer the matter to the domestic relations commissioner for a decision in accordance with the Code of Judicial Administration. (Id., p. 20). On August 17, 1998, the Appellee filed a combined Motion To Dismiss

and Motion For Summary Judgment.² (R. 141). This time, the motion was made pursuant to Rule 12(b)(1) and Rule 56 of the Utah Rules of Civil Procedure. (Id.).

Judge Stirba referred the matter to the domestic relations commissioner. Commissioner Michael S. Evans heard oral argument from both parties on November 17, 1998, and took the matter under consideration. Commissioner Evans entered a Minute Entry on December 2, 1998 recommending that the Appellant's Motion be granted and recommending the Appellant's Complaint be dismissed. (R. 209). A formal order was prepared dismissing the action. (R. 222).

Thereafter, on December 14, 1998, the Appellant objected to Commissioner Evan's recommended order. (R. 214). Judge Stirba heard oral arguments once again on February 11, 1999. (R. 227). Judge Stirba concluded that Commissioner Evan's decision was correct, concluded that the Appellee's motion to dismiss should be granted, but denied the Appellee's request for attorney's fees and costs. (Id). A formal order styled Order Denying Petitioner's Objections and Order Dismissing Action was entered by Judge Stirba on March 2, 1999. (R. 228).

DISPOSITION IN LOWER COURT

² At the time, the Appellee also filed a Motion to Amend Answer and an Amended Answer to remove any doubt concerning the Appellant's position that the Respondent had failed to comply with Utah's Common Law Marriage Statute (R. 131-135)

The District Court granted the Appellee's Motion to Dismiss/Summary Judgment dismissing the Appellant's action with prejudice on March 2, 1999. (R.228). The District Court denied the Appellee's request for attorney's fees at the same time.

STATEMENT OF FACTS

The dispositive facts in this case are not disputed. The Appellant and Appellee were married on February 25, 1969, and divorced in 1980. (R. 33). Shortly thereafter they decided to reside together and did so until July 7, 1996, when they separated for the final time. (R.33). The Appellant filed her action in the Third Judicial District Court on October 7, 1996. (R.1). No proceeding was initiated or obtained by the Appellant to establish the common law relationship either during their relationship or within one year of their separation as required by Section 30-1-4.5(2) U.C.A. (1953), as amended. . (R. 209, R. 223.). Given these undisputed facts, the Appellant's case had no merit under the holding of Bunch v. Englehorn, 906 P.2d 918 (Ut. Ct. App. 1995) and should be dismissed.

The Appellant acknowledges that she failed to follow the procedural requirements set forth in Section 30-1-4.5 and that Bunch disposes of her action. In an effort to avoid this conclusion, however, the Appellant advances arguments that require discussion of additional facts. These additional facts

are addressed below under subparagraphs relevant to the Appellant's arguments.

Pleadings. The Appellant filed her Complaint on October 7, 1996. (R.

1). The only reference to a common law marriage is contained in Paragraph 2 of the Appellant's Complaint:

"2. Plaintiff and defendant are wife and husband having first married in 1969 later divorced in 1980, however, they continued to reside together and held themselves out as husband and wife from February, 1980 to the date the (sic) separation on approximately July 7, 1996."

As will be argued *infra*, the Appellee believed that the Appellant's Complaint was fatally deficient. Therefore, the Appellant responded, consistent with Rule 11, to the common law allegations to the extent they were alleged, and admitted Paragraph 2 of the Appellant's Complaint, but also set up an affirmative defense under Rule 12 of the Utah Rules of Civil Procedure as follows:

"FIRST DEFENSE

The Plaintiff's Complaint fails to state a cause of action against the Defendant upon which relief may be granted."

While it is true that the Appellee also admitted or denied allegations concerning relief that the Appellant was seeking, the Appellee believed, as argued below, that such a response was appropriate and consistent with Utah law in the area of domestic relations.

When the Appellee presented his Motion To Dismiss on August 12, 1998, the Appellant asserted that the Appellee's pleading was ambiguous as to whether or not he admitted a common law relationship. While not conceding that any ambiguity existed, the Appellee filed an Amended Answer to the Appellant's Complaint on August 17, 1998, to remove any question that the Appellee's pleading was ambiguous (R 131 and 136). The Amended Answer unequivocally stated that no common law marriage was entered into and that the Appellant's Complaint should be dismissed (Id.)

Thereafter, with the lower Court's permission (Transcript of Proceedings, 8/12/98, p 21), the Appellee re-filed his motion to dismiss in the form of a Motion To Dismiss and Motion For Summary Judgment (R 141).

Timeliness The Appellee's initial Motion To Dismiss and Memorandum was faxed to the Appellant on August 10, 1998, two days before trial (R 124-125, R 126-129). It was filed with the Court on the day of trial. At trial, the Appellant initially argued against the Appellee's Motion To Dismiss (Transcript of Proceedings, 8/12/98, p 3). In addition, the Court continued the trial to allow the Appellant to fully brief the issues and to submit further oral argument (Id., p 15-16, 18-21).

On August 17, 1998, the Appellee re-filed his motion in the form of a Motion To Dismiss and Motion For Summary Judgment (R 141). The Appellant replied by filing a Memorandum in Opposition To Motion To Dismiss

and Motion for Summary Judgment on August 26, 1998. (R. 150). As mentioned above, Judge Stirba then referred the matter to Domestic Commissioner Michael S. Evans for a decision. Commissioner Evans then took oral argument from both parties on November 17, 1998, and took the matter under consideration. Commissioner Evan's entered a Minute Entry on December 2, 1998, recommending that the Appellant's Motion be granted and recommending dismissing the Appellant's Complaint. (R. 209). A formal order was prepared dismissing the action. (R. 227). After Commissioner Evans entered a decision, Judge Stirba again took oral arguments from both parties, ruled against the Appellant, and entered a further order dismissing the action on March 2, 1999. (R. 228).

SUMMARY OF ARGUMENTS

The Appellee respectfully submits that Utah's Common Law Marriage Statute, Section 30-1-4.5, is a procedural statute whereby parties may establish a relationship as marital in nature by alleging and proving certain elements as required by the statute. Here, the Appellant wholly failed to follow the statute and failed to allege or prove the requisite elements. Under Bunch v. Englehorn, 906 P.2d 918 (Ut. Ct. App. 1995), the Appellant's action must be dismissed.

The Appellee respectfully submits that his pleadings were not defective in any respect. To the extent that the Appellant made any allegations

concerning a common law relationship, the Appellee properly addressed them in his pleadings. However, the Appellant's Complaint wholly failed to state a cause of action for a common law marriage and the Appellee's affirmative defense, of failure to state a claim, was appropriate and sufficient to place the Appellant on notice that her Complaint was defective.

The Appellee respectfully submits that both of his Motions, i.e., his initial Motion To Dismiss filed on August 12, 1998 and his Motion To Dismiss and Motion For Summary Judgement filed on August 17, 1998, were timely and that the Appellee did not waive any right to file the Motions.

The Appellee respectfully submits that Utah's Common Law Marriage Statute is constitutional. It is neither a statute of limitations nor a statute of repose but merely a procedure that must be followed by a party in order to establish a valid common law marriage in Utah.

The Appellee respectfully submits that the trial court erred in not awarding the Appellee attorney's fees and costs and the Appellee seeks a recovery of those attorney's fees and costs below as well as on appeal. The Appellee respectfully requests that this Court remand for the purpose of ascertaining such fees and costs.

ARGUMENT

Point One

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE APPELLANT'S COMPLAINT

A. Introduction.

The District Court dismissed the Appellant's Complaint with prejudice because the Appellant did not comply with Utah's Common Law Marriage Statute, Section 30-1-4.5 U.C.A. (1953), as amended. In doing so, the District Court primarily relied upon Bunch v. Englehorn, 906 P.2d 918 (Ut.App. 1995) that is controlling in this action. The Appellant admittedly failed to properly allege or prove any compliance with the statute. Therefore, the District Court dismissed the Appellant's Complaint. The District Court's ruling was correct and should not be disturbed on appeal.

Recognizing these fatal defects, the Appellant attempted below, as she does on appeal, to misdirect the Court in its analysis of this case and argue that the Appellee's Motion To Dismiss was not timely and that the Appellee waived his Motion To Dismiss. The District Court likewise considered these two arguments and rejected them as having no merit. The District Court's ruling was correct on these issues and likewise should not be disturbed on appeal.

B. The Appellant Failed To Plead Or Prove Compliance With Utah's Common Law Marriage Statute, Section 30-1-4.5 U.C.A. (1953), as amended.

The Statute. The State has had, and continues to have, a strong public interest in regulating marriages. The State's recognition of a valid marriage affects a great many things including, but not limited to, the legitimization of

children and the right to inherit. The State's right to regulate marriage through the passage of legislation cannot be denied.

Accordingly, the State Of Utah through legislation has the right to grant or deny the right to marriage.³ For example, the State has the right, as it does, to prohibit incestuous marriages (Section 30-1-1) and to prohibit polygamous marriages, under-age marriages, and same-sex marriages (Section 30-1-2). There are strong public policy reasons why such is prohibited.

The State also has the right, as it does, to regulate the procedures required to become married, such as the requirement for solemnization (Section 30-1-6) and the requirement to apply for and obtain a marriage license (Section 30-1-7 and 8) and to have such marriage licenses properly recorded (Section 30-1-12). These statutes serve a strong public interest in assuring that a number of obvious public policies concerning marriages and marriage relationships will be preserved.

Utah did not recognize the validity of a common law marriage until 1987 when Utah enacted Section 30-1-4.5. Schurler v. Industrial Commission, 43 P.2d 696 (Utah 1935). Therefore, neither the establishment of a common law marriage nor the remedy of a divorce from a common law relationship existed prior to 1987.

³ Utah has had marriage statutes since 1898 when it became a state

When Utah's Legislature enacted Section 30-1-4.5, the Legislature knew and understood the significance and importance of the statutes granting "conventional" marriages. The Legislature also knew of the mischief that could be easily created by enacting a common law marriage statute that had no criteria or procedures. Therefore, the Legislature enacted a limited exception to the "conventional" procedure by which one could become married and enacted a common law marriage statute that set forth certain requirements, both substantive and procedural, that had to be satisfied before the State would acknowledge a valid common law marriage. With the passage of Section 30-1-4.5, the Utah Legislature required the establishment of certain facts and the completion of certain procedures before a valid common law marriage would be legally recognized.

Pleading and Compliance The Appellant failed to properly plead a cause of action for a common law marriage or comply with the procedure in Utah's Common Law Marriage Statute to establish a common law marriage. Here, all the Appellant pleaded was that the "[parties] continued to reside together and held themselves out as husband and wife from February, 1980 to the date the (sic) separated on approximately July 7, 1996." Section 30-1-4.5(1) identifies the factors that must be established in order to allege the existence of a common law marriage.

- "(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order

establishes that it arises out of a contract between two consenting parties who:

- (a) are capable of giving consent;
- (b) are legally capable of entering into a solemnized marriage under the provisions of this chapter;
- (c) have cohabitated;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife."

While no Utah Court has yet indicated the elements that must be pleaded in order to allege and state a cause of action, one may determine that the following elements are minimally necessary:

- (1) That a "relationship" existed that arose "out of a contract between two consenting parties";
- (2) That the parties were "capable of giving consent";
- (3) That the parties were "legally capable of entering into a solemnized marriage";
- (4) That the parties "cohabitated";
- (5) That the parties "mutually assumed marital rights, duties, and obligations";
- (6) That the parties held "themselves out as and have acquired a uniform and general reputation as husband and wife"; and
- (7) That a "determination or establishment of a marriage" occurred during the "relationship" or "within one year following the termination of that relationship."

In this case, the Appellant's Complaint failed to allege items (1), (2), (3), (5), and (7). When the Appellee filed his Answer, he set forth an Affirmative

Defense that the Appellant's Complaint failed to state a cause of action against him upon which relief could be granted.

The procedure admittedly not followed in this case is Section 30-1-4.5(2) that requires the establishment of a common law marriage by a court or administrative agency either during the relationship or within one year of the termination of that relationship. It provides as follows:

“(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subparagraph (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.”

Under the facts of this case, the establishment of the common law marriage could have occurred at any time after the enactment of Section 30-1-4.5 on July 1, 1987, until July 7, 1997, (one year after the parties separated). Procedurally, it had to have been established by either a court or administrative order within that time frame. Here, the Appellant had over 10 years to establish her claim of a valid common law marriage. Within that time frame, the Appellant had a year following her separation from the Appellee, from July 7, 1996, to July 7, 1997, to establish her claim of a valid common law marriage. It is undisputed that the Appellant took no steps to comply with the statute and failed to obtain any court or administrative order establishing the relationship

during that time frame. It is undisputed that the Appellant took no efforts to even seek a hearing after her Complaint was filed on October 7, 1996.⁴

Based upon the above, the District Court dismissed the Appellant's Complaint with prejudice because the Appellant failed to comply with Utah's Common Law Marriage Statute. The facts of this case are indistinguishable from those in Bunch v. Englehorn, supra. There, the Plaintiff likewise failed to obtain a determination during the parties relationship or within one year of the termination of the parties relationship. The defendant in that action move to dismiss after opening statements on the basis that the trial court lacked subject matter jurisdiction due to the Plaintiff's failure to comply with Utah's Common Law Marriage Statute. The trial court did so. The trial court's decision was upheld on appeal. This Court held that the "plain meaning" of the statute required the Plaintiff to obtain a "timely determination of her relationship with Englehorn" and she failed to do so. Id., p. 921. The facts in the present case are identical. The District Court did not err in determining that Bunch was controlling and dismissing the Appellant's Complaint. The District Court's decision should be upheld.

Point Two

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLEE HAD NOT WAIVED ANY DEFENSES TO THE APPELLANT'S ACTION

⁴ The only requests for a trial in this case were filed by the Appellee. One was on February 14, 1997, and the other was on September 29, 1997. (R. 9 and R. 59).

A. The Appellee's Motion To Dismiss Was Timely.

The Appellant argued below, as she does on appeal, that the Appellee's Motion To Dismiss was not timely. The District Court ruled that the Appellee's Motion to Dismiss was timely. The District Court's ruling should be upheld here.

The Appellant's primary complaint is that the Appellee filed his initial Motion To Dismiss the day trial was scheduled on August 12, 1998.⁵ However, it should be noted that the trial in this matter was continued without date in order for the Appellant to have sufficient time in which to prepare and file a responsive memorandum.⁶ Thereafter, the Appellee re-filed his Motion in the form of a Motion To Dismiss and Motion For Summary Judgment and the Appellant was given more than adequate opportunity to respond.⁷

The Appellant's argument may have had some merit had the trial not been continued and she was not provided an adequate opportunity to respond. Yet, the trial was continued at the Appellant's own request. Having done so, it is quixotic to suggest that she may now continue to object to the timeliness of the Respondent's Motion

⁵ The Appellee had previously faxed a copy of the Motion to Dismiss and accompanying memorandum to counsel on August 10, 1998 (R 124-125 and 126-129)

⁶ The Appellant does not complain on appeal about not having sufficient time in which to adequately prepare any defense to the Appellee's Motion to Dismiss

⁷ Indeed, the Appellant requested and received an additional period of time in which to prepare a response to the Appellee's Motion (R 144-145)

The filing of the Motion to Dismiss on the day of trial by Appellee was proper in every respect. This was the same process and procedure permitted by the Court in Bunch v. Englehorn, supra. There, the defendant filed an answer to the plaintiff's complaint with an affirmative defense, as in the instant case, and moved to dismiss the plaintiff's action following opening arguments at trial. This Court rejected Bunch's claim that she was surprised by the oral motion to dismiss on the day of trial and ruled that the motion was timely. This Court stated, "Assuming, arguendo, that Bunch was surprised by the motion, she could have asked the trial court for a continuance and/or made a post-judgment motion to present her issues to the trial court." Id, p. 921.

The Appellee was not required to file his Motion To Dismiss at a point prior to trial as suggested by Appellant. The Appellee's Motion To Dismiss was made pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Under Rule 12(h), such a motion may be brought at any time including "at the trial on the merits." A motion going to the subject matter jurisdiction of the Court may also be raised at any time. Bunch, supra, and Rule 12(h), U.R.C.P.

Both Commissioner Evans and Judge Stirba found Appellee's Motion To Dismiss timely and rejected the Appellant's arguments. The Appellee respectfully submits that their decisions should be upheld.

B. The Appellee Did Not Waive His Motion To Dismiss.

Statute Of Limitations Argument. The Appellant's first argument is that the District Court erred by rejecting the Appellant's argument that Utah's Common Law Marriage Statute, Section 30-1-4.5(2), is, in reality, a "statue of limitations". And, by bootstrapping that argument, the Appellant argues that the Appellee waived the statute of limitations defense because he did not set forth the statute of limitations as an affirmative defense.⁸

The District Court determined that Section 30-1-4.5(2) was not a statute of limitations and rejected the Appellant's argument. The District Court concluded that the Utah's Common Law Marriage Statute, Section 30-1-4.5(2) was not a statute of limitations but merely a procedure that permits a party to establish a common law marriage by complying with the requirements of the statute. (R.209-213, R. 222-226). Therefore, the Appellee was not required to set forth a "statute of limitations" affirmative defense in his pleadings.

The District Court's decision should not be disturbed on appeal. Section 30-1-4.5(2) is a procedure whereby a party, not having previously enjoyed a "conventional marriage", may obtain a determination that a common law marriage existed. In doing so, however, the statute mandates that certain requirements be met before a common law marriage relationship is established. If one fails to follow the procedures, the common law marriage

⁸ The Appellee set forth the affirmative defense of failure to state a claim but no affirmative defense of a statute of limitations

relationship is not established. Statutes setting forth procedures to be followed, before a right, status, or privilege is conferred, are not uncommon.

The Respondent submits that Utah's legislature possesses the discretion to enact statutes that establish time periods and procedures to be followed and that such statutes are presumptively constitutional. McHenry v. Utah Valley Hospital, 724 F.Supp. 835, 837 (D.Utah 1989). As held in Carrier v. Pro-Tech Restoration, 944 P.2d 346, 355 (Utah 1997), rules of procedure are presumed to be constitutional and any doubts are resolved in favor of constitutionality.

The District Court's rejection of the Appellant's statute of limitations argument, and bootstrapped waiver argument, should be upheld by this Court.

Pleadings. The Appellant argues that the Appellee admitted a common law marriage existed in his Answer and therefore waived any right to present his Motion To Dismiss. The District Court rejected the Appellant's argument and its decision should not be disturbed on appeal.

Here, the Appellant filed an inartfully drafted complaint. Admittedly, one could divine that the Appellant attempted to plead a common law marriage. However, the statutory elements of a common law marriage were not pleaded including one very significant element, i.e., that a judicial determination of the relationship had occurred within one year of the parties' separation.

Accordingly, the Appellee filed an Answer admitting (to the extent alleged) that

some elements of a common law relationship existed between the parties, but not all, and also set forth the affirmative defense that the Appellant's Complaint failed to state a cause of action against the Appellee.⁹ This was sufficient to put the Appellant on notice that her claim of a common law marriage against the Appellee was defective. Thereafter, the Appellant made no effort to satisfy the plain reading of the statute by either amending her Complaint or seeking a determination of the parties' relationship within one year of separation.

Commissioner Evans ruled:

"In his Answer, respondent did assert the affirmative defense of failure to state a cause of action, which is sufficient to put petitioner on notice as to potential motions. Further, the factual basis of respondent's Motion To Dismiss had not yet occurred at the time respondent filed his Answer as one year had not yet passed from the time of termination of the parties' alleged common law marriage relationship." (R. 210).

Judge Stirba agreed with Commissioner Evans. In overruling the Appellant's objections to Commissioner Evans ruling, Judge Stirba obtained the Appellant's concession that it was the Appellant's burden to comply with Utah's Common Law Marriage Statute. (Transcript of Proceedings, 2/11/99, p. 16-17). Further, Judge Stirba opined that a waiver argument may not even be available to either party under Utah's Common Law Marriage Statute. (Id., p. 17). This is because the argument *assumes* that the statute's specific

⁹ The reasoning of Appellee in filing an Answer with an affirmative defense, instead of immediately filing a Motion To Dismiss to the Appellant's Complaint was that (a) the period in which to establish the marital relationship had not run and Appellee anticipated that the Appellant would file for such a hearing within the time period and (b), even if the Appellant failed to do so within the time period, the Court still might have power to divide joint assets and debts of parties who lived together based upon their stipulation to do so under the decision in Jenkins v. Jenkins, 153 P 2d 261, 264 (Utah 1944)

requirement, that common law marriages be established only by “a court or administrative order”, may be waived. She doubted that the legislature had that in mind. She suggested that a waiver argument would allow parties to evade the requirements of the statute. (Id).

The Appellee respectfully argues that his Answer and affirmative defense appropriately put the Appellant on notice that her pleading was defective. The Appellant was obligated to move forward and comply with the statute and she failed to do so. At no time did the Appellant waive his defense.

The Appellant’s argument that the Appellee somehow waived his defenses by “acquiescence”, i.e., by participating in his defense of the Appellant’s Complaint and his trial preparation, is spurious. The Appellee is permitted by the rules to engage in discovery and is required by rule to attend the trial court’s conferences. As stated supra, the Appellee’s stipulation to a short period of temporary spousal support was made without precedent to any subsequent award of alimony. (R. 67). The District Court’s holding rejecting the Appellant’s waiver argument should be affirmed.

In conclusion, the District Court properly ruled that the Appellant had failed to comply with Utah’s Common Law Marriage statute and properly dismissed the Appellant’s Complaint. The Appellant’s arguments of timeliness and waiver were properly rejected by the trial court. The District Court’s determinations should be upheld.

Point Three

THE DISTRICT COURT DID NOT ERR IN FINDING UTAH'S COMMON LAW MARRIAGE STATUTE, SECTION 30-1-4.5 U.C.A. (1953), AS AMENDED, CONSTITUTIONAL

A. Introduction.

The Appellant's argument that Utah's Common Law Marriage Statute, Section 30-1-4.5 U.C.A. (1953), as amended, is unconstitutional was rejected by the District Court. The District Court rejected the Appellant's argument that Utah's Common Law Marriage Statute was a statute of repose. (R.209-213, R. 222-226). The District Court's determination was correct and should not be disturbed on appeal.

The Appellant argued below that Utah's Common Law Marriage Statute is either an unconstitutional statute of limitations or an unconstitutional statute of repose. The Appellant has apparently dropped her argument on appeal that the statute is an unconstitutional statute of limitations. In any event, the Appellee rejects both arguments and states that the statute is merely one of procedure. Viewed either as a statute of limitations, statute of repose, or as merely one of procedure, the statute is deemed presumptively constitutional. McHenry v. Utah Valley Hospital, supra, p. 837 and Carrier v. Pro-Tech Restoration, supra, p. 355. Here, the Appellant bears the burden of demonstrating that the statute is unconstitutional. Snow v. Keddington, 195 P.2d 234, 240 (1948).

B. Section 30-1-4.5(2) Is Not A Statute Of Repose.

First, the Appellee submits that Section 30-1-4.5(2) is not a statute of repose because the statute did not “abrogate a remedy” available to the Appellant under common law. The Utah Supreme Court has made it clear that a statute is not a statute of repose unless it extinguishes or abrogates a remedy that was available under common law. Ross v. Schackel, 920 P.2d 1159, 1166 (Utah 1996); Bott v. Deland, 922 P.2d 732, 736 (Utah 1996); and Berry v. Beech Aircraft Corp., 717 P.2d 670, 677 n.4, 680 (Utah 1985). In each of these two former cases, the Court upheld Section 63-30-4(4) against a statute of repose argument because it found that Section 63-30-4(4) did not abrogate an existing legal remedy available at common law. In Berry, supra, the Court indicated that an initial analysis should start with an inquiry concerning the nature of the remedy allegedly abrogated by the statute of repose and the substituted remedy. There must be some pre-existing remedy being abrogated by the alleged statute of repose before a court may inquire further.

In this case, there was no right under common law in this state for a common law marriage. Here, the Appellant had no pre-existing marriage, right, or remedy that was abrogated by operation of Utah’s common law marriage statute. The right to establish and claim a common law marriage in this state is a statutory right created by Section 30-1-4.5. Therefore, even assuming

Section 30-1-4.5(2) cuts off certain rights unless its procedures are met, it does not follow that the section is a statute of repose because no right existed under common law for common law marriages in this state.

Second, Section 30-1-4.5(2) is not a statute of repose because it merely sets forth a procedure to be followed *before* a relationship is deemed a valid marriage. The Appellant did not have a valid marriage to begin with. The Appellant did not *lose or forfeit* any interest by operation of the statute as occurs in true statutes of repose. A statute of repose, like a statute of limitation, bars or terminates a *pre-existing* claim for relief. In this case, the Appellant had no claim for relief to be barred or terminated because she failed to follow the procedural requirements of the statute in order to validate her alleged marriage relationship. As stated above, statutes that prescribe procedures and time periods for parties to observe are presumptively valid. Carrier v. Pro-Tech Restoration, *supra*.

Therefore, Section 30-1-4.5(2) is not a statute of repose.

**C. Section 30-1-4.5(2) Is Not Unconstitutional
Even If It Is Characterized As A Statute Of Repose.**

Not all statutes of repose are unconstitutional. “To hold every statute of repose unconstitutional without regard to the legislative purpose could result in a legislative inability to cope with widespread social or economic evils.” Berry, *supra*, page 680. Rather, the burden is upon the Petitioner to demonstrate that Berry’s two part analysis has been met. This is not possible under the facts of

this case.

The first prong of Berry requires the court to determine whether Section 30-1-4.5 provides an injured person an effective and reasonable remedy to that remedy being abrogated by the statute. Indeed it does even assuming the statute abrogated a remedy existing at common law. The Appellant had from July 1, 1987, (the effective date of the statute) to July 7, 1997, (one year following the parties' separation) in which to established a valid marriage. She could have done this while the relationship was ongoing or within one year after its termination. The Appellant chose not to do so. The Appellant does not explain her failure to take advantage of this effective and reasonable remedy. The Appellant complains that one year is too short; however, statutes of limitations having similar time periods have been upheld. Lee v. Gaufin, 867 P.2d 572 (Utah 1993) (also involving statutes of repose arguments). As indicated in Lee, the Legislature's fixing of lengths of times for limitations is afforded great latitude. *Id.*, 575-576. Moreover, the Appellant was not limited to one year. She had over 10 years to establish her claim of a valid common law marriage. The barring of a remedy caused by the Appellant's own failure to take advantage of Section 30-1-4.5 within the time period afforded by statute does not afford her the right to complain.

The Appellant's argument that Section 30-1-4.5(2) is not definitive concerning where to obtain a determination of the marriage relationship within

one year of separation is without merit. In the first place, the statute is clear that a party must establish the common law marriage relationship by “a court or administrative order.” The plain meaning of the statute is that the moving party must seek either a judicial or an administrative determination. Here the Appellant filed her Complaint before the “Court” but made no effort to seek a “determination” or “establishment” by the Court. Second, the Bunch decision was issued in 1995. Any uncertainty concerning the procedure of the statute and how it operated was removed by Bunch prior to the filing of the Appellant’s Complaint. Therefore, the Appellant cannot sustain her burden under Berry’s first prong of analysis.

Second, even if there were no substitute or alternative remedy provided as required by the first prong of Berry, the Court may still deem the abrogation justified if “there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means of achieving the objective.” *Id.*, page 680. In this case, Section 30-1-4.5 does not abrogate any right but merely sets forth a procedure and time period for the establishment of rights attendant to a valid marriage. The statute’s time periods and procedures, even if restrictive, are justified because clear social and economic evils would exist unless the statute were followed. As set forth above, the State has a vital interest in regulating marriages. Therefore, the Appellant cannot establish the second prong of the Berry

analysis.

The Appellee respectfully submits that Utah's common law marriage statute is neither a statute of repose nor limitations and, even if it were characterized as such, it is not unconstitutional. The District Court's decision rejecting the Appellant's claim of unconstitutionality should be upheld on appeal.

Point Four
THE APPELLEE IS ENTITLED TO ATTORNEY'S FEES.

The District Court rejected the Appellee's claim for attorney's fees and costs. (R. 228-230). The District Court's decision was in error. As discussed, *supra*, the Appellant's obligation to establish her claim of a common law marriage within the time of the alleged relationship or one year thereafter was clear under the statute and Bunch. The Appellant simply failed to do so as required by the statute and Bunch. The Appellant's continued resistance to the trial court's decision dismissing her Complaint, with spurious and frivolous claims, is not proper and has resulted in substantial attorney's fees and costs.

The Appellee should also be entitled to attorney's fees and costs on appeal under Rule 33 of the Utah Rules Of Appellate Procedure. The Appellant continues to advance frivolous arguments to disguise her own failures in this case. The Appellant's arguments on appeal are not pursued in good faith, not warranted under existing law, and not made in good faith to extend, modify or reverse existing law. *Cf. Eames v. Eames*, 735 P.2d 395 (Ut.

App 1987)

The Court should remand to the District Court for the purpose of determining an award of fees and costs for the Appellee expended below and on appeal

CONCLUSION AND RELIEF SOUGHT

The decision of the District Court dismissing the Appellant's Complaint with prejudice should be upheld. The Court should award attorney's fees and costs to the Appellee, incurred both before the trial court and on appeal, and remand the case to the District Court for the purpose of determining the amount of fees and costs.

DATED this 19 day of November, 1999

A handwritten signature in cursive script, appearing to read "Stephen W. Cook", is written over a horizontal line.

STEPHEN W. COOK
Attorney for Respondent

CERTIFICATE OF SERVICE


STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

STEPHEN W. COOK, being duly sworn, says:

That he is the attorney for Respondent herein; and that he served the attached BRIEF OF RESPONDENT/APPELLEE upon:

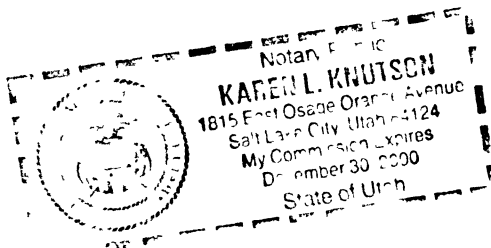
L.G. CUTLER
Attorney at Law
560 East 200 South, Suite 220
Salt Lake City, Utah 84102

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 19 day of November, 1999.



STEPHEN W COOK

Subscribed and sworn to before me this 19 day of November, 1999.





NOTARY PUBLIC